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CURRENT TOPICS.

It seems that Lord Coleridge is not so wise that he will not learn. On the contrary, during his recent tour in the United States, he kept his mind open to a sufficient extent to take in some of the more obvious of American "modern improvements" in the constitution and organization of courts of justice. And so deeply was he impressed by the American systems of judicature, that he has successfully urged the Ministry of Mr. Gladstone to propose to Parliament an imitation of one feature at least, of the American system. In the St. Louis *Post-Dispatch* of the 29th of November, appears the following special cablegram:

"LONDON, Nov. 26.— Lord Chief Justice Coleridge has already begun to put into practical use the professional information he obtained in the United States during his recent tour. His lordship, since his return, has discussed freely with the great lawyers and judges of London the merits aud demerits of American jurisprndence, and in these semi-professional conferences has never hesitated to express great admiration for the manner in which Americans have developed the local or home government idea until, as he says, it has become to observant foreigners the most striking feature of American institutions. The general government, Lord Coleridge thinks, although not strictly more constitutional than that of England, appears to the foreign observer to have less to do with the people or their personal affairs, than any government in the world, and to be confined in its functions within a sphere that it might be described as simply an international agency or bureau, with practically no absolute power of its own, and acting under popular direction. Lord Coleridge has taken every opportunity of impressing these views upon the liberal members of the profession in England, and has already succeeded in breaking down much conservative prejudice. His first attempt to Americanize British practice has been entered u pon, and has already gone beyond the mere approval of his colleagues and secured favorable Cabinet action. This step has for its object the formation of a system of district courts throughout England, after the model of the district courts in the United States. A bill for the creation of such a system of courts in England has been prepared under the supervision, it is understood, of Lord Coleridge, and has been accepted by the Cabinet."

This is a rather remarkable step considering the conservative tendencies of the English mind generally, and especially in all matters connected with the modes of administering justice. *Stare decisis* have in that country always been words of power in judicial affairs, and besides their legitimate application to the due interpretation of the law, have often been misapplied to collateral matters and have caused much public inconvenience and private injury. Ancient institutions which had long out lived their usefulness have been religiously preserved to the detriment of both public and private interests, and hoary abuses are always tenderly handled by the English reformer in deference to their antiquity.

A system of District Courts in England, by which a law suit in the provinces can be commenced and concluded, without reference actual or theoretical to the great judicial centre London, is a wide departure from the old constitution of the court of King's Bench in which each defendant was, theoretically at least, required to appear "before the King himself, wheresoever in England he might be."

A lie of any sort is proverbially long lived, and a legal fiction has no less vitality than more nefarious falsehoods. The fiction that the King presided in person in the court of King's Bench, operated for centuries, more or less directly, to centralize the administrator of law in England, rendering it much more inconvenient and costly than was at all necessary. It was evaded by the system of assizes and *nisi prius* courts, but until recently it does not seem to have occurred to anybody in England, that justice could be duly administered by a system of distinct local courts, each being independent of all others, except an appropriate appellate tribunal. We all live and learn, and so it seems does Lord Coleridge and the Gladstone Ministry.

IGNORANCE OF LAW.

"A mistake of law," says Chief Justice Dixon,[1] "happens, when a party having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment upon facts as they really are."[2] The question as to what extent courts should be governed by the maxim *ignorantia, etc.*, has been, and still is the subject of much controversy. It has been urged in this connection, that there is a distinction between the terms ignorance and mistake;[3] but Lindley on Jurisprudence,[4] asserts that it is immaterial whether the error consists of ignorance or mistake, and "an examination of the distinction * * taken between ignorance of law and mistake of law, and also of the numerous cases where relief has been asked and granted upon mistake of law, will show that such distinction is of little value."[5] So, Mr. Justice Bronson, in Champlin v. Laytin,[6] affirms, that the distinction between ignorance and mistake of law "rests on no solid foundation;"[7] and so are the majority of cases.

Opinions of the Text Writers.—In Pothier on Obligations,[8] it is said that "an ignorance of the law does not avail those who are desirous of acquiring, but does not injure those who merely seek their own." So, "an error in the law does not subject any person to the injury of losing his property; * * * * therefore, whenever the question relates to avoiding or repairing a loss, an ignorance of the law does not induce any prejudice." And again,[9] "a man suffers loss in the deprivation of his property, and the reparation of a loss is not to be regarded as a new acquisition. * * * * An error of law is of no avail to those desirous of making an acquisition, but it is no detriment to those who only seek their own property and contend against the injury of losing it." In Lindley on Jurisprudence,[10] we find the same distinction between positive acquisition and avoiding a loss; and while it is asserted that "in matters civil, ignorance of law is no ground upon which a person can defend himself from the suit of another, or can himself take active steps to avoid the effect of his own acts,"[11] it is admitted that "cases may occur in which an error * * * * as to law or fact may be legally excusable;" also, that "Ignorance of matters of law is prejudicial when the result of gross negligence, * * * * harmless when not so."[12] We have the rule given by a late writer,[13] that a "mistake of law, to be a ground of relief in equity, must be of a material nature and the determining ground of the transaction." Bishpam's Principles of Equity,[14] after declaring the existence of the principle that both at the common law and in equity, relief will be refused, when claimed on the ground of a mistake of law, adds that "of late years, the disposition of courts and text-writers seems to be to qualify the proposition by many exceptions, and no little difference of opinion, perhaps, exists as to whether it can now even be asserted as a general rule. Perhaps a correct statement of the doctrine, as at present received, would be to say that the maxim, *ignorantia juris non excusat*, is not of universal applicability in equity,"[15] that it is clear that any additional circumstance will be considered by the courts, if it will enable them to the more easily interpose and grant relief. The question is exhaustively reviewed by Judge Story.[16] He premises that "as one is bound to know the law, and consequently presumed to know it, there seems to be an inconsistency in granting relief in courts of equity, based

[1] In Hurd v. Hall, 12 Wis. 113, cited with approval by Orton, J., in Burkhauser v. Schmitt, 45 Wis. 316; s. c., 30 Am. Rep. 740.

[2] See Bishpam's Prin. of Eq. (3d ed.), sec. 185.

[3] 17 Cent. L. J. 22.

[4] P. 24; Law Library, vol. 86, p. 35.

[5] Reporter's note—23 Am. Dec. 164—to Lawrence v. Beaubien; s. c., 2 Baileys, 623, and cases cited. See 31 Am. Dec., note 396.

[6] 18 Wend. 407; Jacobs v. Morange, 47 N. Y. 57.

[7] But *contra*, read opinion of Senator Paige, in same case.

[8] 2 Evans, 362; Dissertation on Mistakes of Law, by M. D'Aguessau.

[9] Id. 385, On the Select Questions of Vinnius.

[10] P. 24; Law Library, vol. 86, p. 35.

[11] Id. 194, append. 19.

[12] Id., quoted in Kerr on Fraud and Mistake, 406.

[13] Kerr on Fraud and Mistake, 399-408.

[14] 3d ed., secs. 187, 188.

[15] Citing: McMurray v. St. Louis Co., 33 Mo. 377; Peters v. Florence, 2 Wright (Pa.), 194; Gwynn v. Hamilton, 29 Ala. 233; Glenn v. Statler, 42 Iowa, 107; Carpenter v. Jones, 44 Md. 625; Mills v. Miller, 2 Wool. (Neb.) 299; Lyon v. Sanders, 23 Miss. 530; Zollman v. Moore, 21 Gratt. 320; Fergerson v. Fergerson, 1 Geo. Dec. 135, and many others.

[16] 1 Story's Eq. Jur. (11th ed.), secs. 116-125, 137, *et seq.*, and notes.

solely upon an alleged mistake of law;"[17] but urges as a qualification to this doctrine, the necessity of the clearest proof to enable courts of equity to correct such alleged mistakes; and states, "that the exceptions allowed must be of a marked character, both in regard to proof and the degree of injustice consequent upon a denial of relief." So, in considering cases where in consequence of mistake or misapprehension of the law, a party relinquishes known rights, "or assumes duties upon grounds which he could not have entertained but for such misapprehension," or where a failure to grant the desired relief would render an unconscionable benefit to the opposing party, says: "The denial of such relief would seem to be at variance with the long established doctrines of courts of equity and a reproach to the law itself."[18]

Opinions of the Courts.—We come now to the cases, some of the most important of which we have collated. In Midland Great Western R. Co. v. Johnson,[19] it was decided, upon the particular circumstances of that case, that a mistake of law in a contract is not a ground for relief in equity. It was not so stated, however, as a rule, nor was the point argued. So, where there was a mistake as to the legal effect of a certain agreement to lease. It was determined that the court would not on that account merely, refuse to decree specific performance of the contract.[20] The principle is affirmed in Martin v. Hamlin,[21] that a mistake by a party as to the legal effect of an instrument, the contents of which he knew, is not a ground for relief, but there is no discussion of the question. The facts were briefly these: The plaintiff accepted a deed of certain land upon the representations of defendant that it contained 110 acres. It was orally agreed that the same might thereafter be surveyed, and if there should be less than 110 acres, the deficiency, at an allowed rate per acre, should be indorsed upon the note and mortgage, or if it exceeded 110 acres, plaintiff should pay in addition therefor at the same rate. Upon this agreement, the deed was delivered and possession taken by the plaintiff. A survey being then made, discovered the amount of land to be 93 1-2 acres. Defendant refused to carry out his agreement, and a bill was brought to enforce the same, though no fraud was alleged. The deed was a warranty, and the court (Christiancy, J.), held that, as to this point of the case, if plaintiff "relied upon the quantity mentioned in the deed as a guaranty, * * it was a mistake of the legal effect of the instrument, the contents of which he knew—purely a mistake of law—this is no ground for relief."[22] Lewis v. Jones[23] is cited as an authority in support of the general rule, but in that case the question was one of fact as to whether the representations of defendant's agents, which induced the signing of a certain composition deed by plaintiff, were fraudulent or not, and it was ruled that the representations were those of fact, within the knowledge of the plaintiff; that they would not avoid the deed, because not calculated to mislead. It was upon this view of the case that the decision was made.[24] The case is frequently cited of where two are jointly bound by an obligation or bond, and the obligee releases one, believing that the other will be holden, here the plea of ignorance of law will not avail.[25] Justice Bronson, in Champlin v. Laytin,[26] argues that a party may not "avoid his act or deed on the ground that he was ignorant of law;" but admits that "there are some few cases in the books which either directly favor the opinion that relief may be granted on the ground of ignorance or mistake in matter of law, or where the courts have been so solicitous to reach what has been deemed the equity of a particular case, that they have proceeded upon distinctions too subtle for practical utility," and continues: "It is better that a general

17 Id., secs. 138*a*, 138*e*, 138*f*.

18 See, also, 2 Kent's Com. (12th ed.) 491, and notes *e*, *f*, *and k*; Addison on Cont. (7th ed.), 232; Broom's Leg. Max. 263; 3 Parsons on Cont. 398 (6th ed.) 2 Phillips on Ev. (Cowens and Hills and Edwards' notes) 587; S. P., 699; Waterman's Specific Perform. of Cont., secs. 350-356.

19 6 H. L. Cas. 798; 4 Jur. (N. S.) 643.

20 Powell v. Smith, L. R. 14 Eq. 85.

21 18 Mich. 354. The cases cited are: Irnham v. Child, 1 Bro. C. C. 92; Townsend v. Stangroom, 6 Ves. 328; Norrall v. Jacob, 3 Mer. 267; Hunt v. Rousmaniere, 1 Pet. 1; 2 Mason, 366; Gilbert v. Gilbert, 9 Barb. 532; Arthur v. Arthur, 10 Barb. 9; Farley v. Bryant, 32 Me. 474; Mellish v. Robertson, 25 Vt. 608.

22 See Burt v. Wilson, 28 Cal. 632.

23 4 Barn. & C. 506.

24 But read Edwards v. Brown, 1 C. & J. 307.

25 Harman v. Cam. 4 Vin. Abr. 387, pl. 3, cited in Broom's Leg. Max. (7th ed.) 263.

26 18 Wend. 407; S. C., 1 Edw. Ch. 467; 6 Paige, 189. This case is criticised in Story's Eq. Jur., sec. 138*g*.

rule should be denied at once, than to admit its existence and multiply exceptions until its practical influence is no longer felt." The Vice-Chancellor, in the same case, asserts the general rule to be true, and states as exceptions thereto, cases of mutual mistakes of law by the contracting parties: surprise; taking advantage of another's ignorance of law in making a contract; as "where the party seeking such relief acquired no beneficial interest by the contract, and where the adverse party has parted with nothing of any real value, or where the latter has intentionally deceived the other as to the opinion of counsel or the decision of a judicial tribunal upon the question of law." This cause seems only to have determined that if the mistake of law occasions a mistake of fact, relief may be had.

Lyons v. Richmond,[27] sustains the general rule; but in Mellish v. Robertson,[28] it is qualified as follows; "A mistake of law is not, ordinarily, a ground of relief in equity." So, the "equities ought to be clear and strong that would warrant" the setting aside a sale of lands on the ground of misapprehension of his rights, or a mistake of law by a purchaser;[29] and "a mistake on one side may be a ground for rescinding, but not for correcting an agreement."[30] Harden v. Ware[31] is a strong case in support of the general rule. The decision is, that where a party, upon due deliberation, having a full knowledge of all the facts, enters into a purchase of land without any persuasion or inducement on the part of the other contracting party, he can not obtain relief on the ground of ignorance of law, that the cases where this plea has availed were those where the "mistake was so gross and palpable as to superinduce the belief that some undue advantage was taken of the party." Gross v. Leber[32] positively asserts the rule that a mistake of law is no ground for relief; and Mr. Justice Walker[33] declares that a departure from the maxim, *ignorantia, etc.*, "under any circumstances, should be distinctly marked, and so guarded as to leave the general rule unimpaired." Equity will not relieve where there has been a long acquiescence under the mistake, and neither party knew of it,[34] or in case of agreements entered into to prevent family disputes;[35] or where the question of law is doubtful, "and the doubtfulness of that question is made the basis of any arrangement or agreement."[36]

Pullen v. Ready,[37] although frequently cited as an authority supporting the maxim, can hardly be considered, since the facts in that case were fully known to the parties, an agreement prepared and approved by counsel was made between them, and was in settlement of family affairs. Nor is Willan v. Willan[38] an authority, because in that case an agreement was ordered given up on the ground of surprise, since neither party underderstood the legal effect of the instrument, and the question of relief on the ground of ignorance of law was not considered.

The rule is laid down in very certain terms in an Illinois case,[39] which was a suit in chancery praying that a deed of conveyance might be reformed on the ground of mistake. The court held that "The rule is inflexible that a mistake or misapprehension of the law is never relieved against or corrected. If a party designs to, and performs an act under a mistaken view of the law affecting the transaction, he is held to the obligation incurred. As a matter of necessity all persons are presumed to know and act in view of the law; * * * * the rule applies equally in the administration of criminal, common law and equitable justice; all three of the courts are governed by this maxim." The law is not, however, reviewed; there is simply the bare *dicta*. The court finally found that no mistake either of law or fact existed. Relief was therefore denied. Kitchin v. Hawkins,[40] was a case where the plaintiffs, who were the creditors of defendants, had received money under a mistake of law as to the legal effect of a composition deed, which had been

27 2 Johns. Ch. 51.
28 25 Vt. 603.
29 Cooley, J., in Ledyard v. Philips, 32 Mich. 13; Wood v. Griffin, 46 N. H. 237; Tilton v. Nelson, 27 Barb. 595.
30 Sutherland v. Sutherland, 69 Ill. 481.
31 15 Ala. 149.
32 47 Pa. St. 520, affirming Rankin v. Mortimer, 7 Watts, 372; McAninch v. Laughlin, 1 Harris, 371.
33 In State v. Prup, 13 Ark. 129.
34 Vaughan v. Thomas, 1 Bro. Ch. C. 556.
35 Stapleton v. Stapleton, 1 Atk. 10.
36 Sir J. Stuart, V. C., in Stowe v. Godfrey, 18 Jur. 162; Cann v. Cann, 1 P. Wms. 724; Stewart v. Stewart, 6 Clark & Finn, 911, and notes.
37 2 Atk. 587. See also Lawton v. Campion, 18 Jur. 818.
38 16 Ves. 72.
39 Goltra v. Sanasack, 53 Ill. 456.
40 L. R., 2 C. P. 22.

drawn up under a supposed compliance with the Bankruptcy Act of 1861,[41] although the deed was subsequently declared void. The case turned upon the point that, the plaintiffs having received the money under a deed of composition which they believed at the time to be valid, should obviously, in justice, be bound thereby, since the question is merely upon a nice point of law, and not of fact.

While it is true that no rules have been formulated which are of especial value in determining when relief for mistake or ignorance of law may be demanded, still, it is equally certain that such relief has, in numerous cases, not in themselves exceptional, been granted. It is argued that "the remedial power claimed by courts of chancery to relief against mistakes of law is a doctrine rather grounded upon exceptions than on established rules."[42] But Chief Justice Marshall's opinion is that "We find no case in which a plain and acknowledged mistake of law is beyond the reach of equity."[43] So Lord Justice Turner[44] holds that the "Court has power * * * * to relieve against mistakes in law as well as against mistakes in fact," but "it is, I think, the duty of the court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done." The principle is tersely expressed in the following words: "No doubt a mistake in point of law may be corrected both in this court and a court of law. This is now, perhaps, sufficiently established, though it was for some time a subject of controversy in courts of law; I apprehend it is now settled that when money has been paid, or a conveyance executed in ignorance of a point of law, relief may be granted," but relief will be refused when "it is against good conscience that the party who made the mistake should be freed from the consequences of his error. If, on the other hand, it would be against good conscience that the party in whose favor the mistake was made should reap the benefits of it, the court will then interpose and prevent any prejudice to the interest of the person who committed the mistake."[45] Equally clear is the sentence: "No man acting under a plain and settled mistake of his legal rights, shall forfeit those rights in consequence of such misapprehension."[46] This opinion is commented upon in Cumberland Coal Co. v. Sherman,[47] as sanctioned by "some of the most enlightened and celebrated men, whose characters are recorded in judicial history." In this case it was also decided that a misapprehension of the law in cases where it is doubtful would be a proper ground for relief. The last point is illustrated by the case where the parties entered into a contract concerning which there was a doubt whether it was usurious or not; the contract was made, however, under the advice of counsel. It was held that there did not appear to be an intent to violate the statute, and that if the contract was usurious both parties had acted under a mistake of the law and relief was given.[48] Moreland v. Atchison,[49] supports the opinion that in most of the cases the rule that, "Every man who makes a contract acts advisedly and with a knowledge of its legal effects and consequences," is qualified, and it is there urged, that "so harsh a rule, founded upon a presumption so arbitrary, ought to be modified in its application, by every exception which can be admitted without defeating the policy." An Ohio case is also an authority to the effect that this presumption may be rebutted by proof and a claim for relief for mistake of law, be sustained.[50] Onions v. Tyrer,[51] decides, perhaps indirectly, that a mistake in law may, in certain cases be relieved against; so much of that decision as bears upon this question, is summed up as follows: If a former will is cancelled by the testator's directions upon the presumption that a later will is valid, which proves void, "such cancelling should not have profited the

[41] 24 and 25 Vict., ch. 134, sec. 192.

[42] Court, in Bank of United States v. Daniels, 12 Pet. 32.

[43] Quoted in Lowndes v. Chisholm, 2 McCord's Ch. 455; s. c., 16 Am. Dec. 667.

[44] Stone v. Godfrey, 54 Eng. Ch. Rep. 76; 5 DeG. M. & G. 76.

[45] Cooper v. Phibbs, 17 Ir. Ch. 73, citing Brisbane v. Dacres, 5 Taunt. 143. See L. R., 2 H. L. 149.

[46] Lammott v. Bowley, 6 H. & J. 500; Green v. Morris, etc. R. Co., 12 N. J. Eq. 165; Hudon v. Ware, 15 Ala. 149.

[47] 20 Md., 117.

[48] Mortimer v. Pritchard, 1 Ball. Ch. 505; Gordere v. Downing, 18 Ill. 492; Conover v. Wardell, 20 N. J. Eq. 266.

[49] 19 Tex. 303.

[50] Evarts v. Strodo, 11 Ohio, 480.

[51] 1 P. Wms., 344.

heir, because it would have been a cancelling, proceeding from a mistake."

Where the plaintiff, being an heir-at-law of a stockholder in a certain company, believing that the shares were in the nature of real estate, and that he was legally liable in respect thereto, executed an indenture to the trustees, agreeing therein to indemnify and reimburse them for any loss or damage they might sustain, by reason of giving guaranties for certain loans to be raised for the benefit of the company. The bill prayed for relief to the plaintiff from any liability under the deed, alleging that it had been executed under misapprehension and mistake, and although it was strongly urged that the mistake was one of law, the court ruled that the bill should be granted, on the ground that the indenture was executed under a mistake of law and fact.[52] This case is important, as showing that any additional circumstance will be readily considered by the court, if it enables them to grant the relief required.

It is declared by Colcock, J., in Lowndes v. Chisolm,[53] that "It is well established that relief is given in cases where the mistake has been clearly one of law, and the authorities relied on put the matter beyond all doubt, if, indeed, it could be doubted at this day." An action was brought by an indorsee against an indorser of a bill of exchange made under the following circumstances, *viz :* Defendant never received any funds to discharge the bill. It was protested for non-payment, but the holder neglected to give proper notice thereof to either plaintiffs or defendant. The plaintiffs, notwithstanding, paid the amount of the bill. Thereafter advice of the non-payment was received by the defendant, who, believing himself legally liable, acknowledged such liability to the plaintiffs and engaged to make payment. It was held that, "Although the defendant, when he received notice from the plaintiffs of the protest of the bill, considered himself as liable by law to pay the plaintiffs the amount of it, yet his ignorance of the law shall not bind him to fulfill an engagement made through mistake of the law." [54] A Kentucky case [55] goes so far as to hold that, where a man through misapprehension on the part of his counsel as to his actual legal liability, binds himself beyond such liability, he may be relieved in equity. The reasoning of the court in Underwood v. Brockman,[56] is, that "If one ignorant of a plain principle of law, shall without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, what principle of law or dictate of justice or policy would require him to be bound as with a Gordian knot, which nothing but the sword could loose?" Frevall v. Fitch,[57] was a case where a recovery was sought against the defendant on his indorsement of a specialty issued by the bank, having its corporate seal on its face and drawn up in the form of a promissory note. Defendant's broker effected a sale of the specialty, by a representation that to the indorsement of this paper the same liability attached as if it was a promissory note. It was ruled, that although the misrepresentation was an innocent one, yet if the note was purchased under an erroneous impression received therefrom, the bargain was a nullity and the price could be recovered back; that even if the misconception be one of law the court will annul the contract. The language of Waite, J., in a Connecticut case is: "The rule that money paid or property conveyed under a mistake as to the law can not be recovered back, although often repeated, is not of universal or unqualified application. Exceptions to it, as a general rule, have often been made, and have received the sanction of courts of justice," and that if defendant ought not in good conscience to retain money or other property so obtained he should be compelled to restore it.[58] This opinion is criticised as being "just as a principle, but entirely indefinite as a rule. * * * * It

[52] Boughton v. Hutt, 60 Eng. Ch. Rep, 500; S. C., 3 DeG. & J. 500; Hirschfield v. London, etc. Co., L. R. 2 Q. B. Div. 1; Harrell v. DeNormandie, 26 Tex. 120.

[53] 2 McCord's Ch., 455, citing Hunt v. Rousmaniere, 8 Wheat. 215, and Landsdown v. Landsdown, Mosely, 346.

[54] Warder v. Tucker, 7 Mass. 449. Approved in Freeman v. Boynton, Id. 483. *Contra*, Stevens v. Lynch, 12 East. 38.

[55] Fitzgerald v. Peck, 4 Litt. 125.

[56] 4 Dana, 309; S. C., 29 Am. Dec. 407.

[57] 5 Whart., 325, citing Lansdown v. Lansdown, Mosely, 364. See Rushdall v. Ford, L. R. 2 Eq. 750; Beattie v. Ebury, L. R. 7 Ch. 777; S. C., L. R. 7 H. L. 102.

[58] Stedwall v. Anderson, 21 Conn. 138; *Ex parte* James, 6 Ch. 614. See also Wooden v. Haviland, 18 Conn. 101, 108.

overlooks the public interests involved in maintaining the obligation of contracts; generally as between the parties a mistake of law has as equitable a claim to relief as a mistake of fact." [59]

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[59] Jordan v. Stevens, 51 Me. 78. Recovery of money paid under a mistake of law, see Mowatt v. Wright, 1 Wend. 355; s. c., 19 Am. Dec. 508, note 515; Norton v. Marden, 15 Me. 45; s. c., 32 Am. Dec. 132; note to Lawrence v. Beaubien, 23 Am. Dec. 164; note to Storrs v. Barker, 10 Am. Dec. 323; Barkhauser v. Scmitt, 45 Wis. 316; s. c., 30 Am. Rep. 740. Equity will relieve against ignorance of title. Turner v. Turner, 2 Ch. Rep. 81; Evans v. Llewellyn, 2 Bro. Ch. C. 150. As to compromise, see Lawton v. Campion. 18 Jur. 818. The law on the maxim *ignorantia*, etc., is ably reviewed in the note to Black v. Ward, 15 Am. Rep. 162, 171; s. c., 27 Mich. 191. The following are a few additional cases to those already given: Cadaval v. Collins, 4 Ad. & El. 858; Sturge v. Sturge, 11 Beav. 229; Kelly v. Solari, 9 M & W. 54; Mellers v. Duke of Devonshire, 16 Beav. 257; Norris v. Blethen, 19 Me. 348; Cummins v. White, 4 Black (Ind.),356; Newson v. Bufferlow, 1 Dev. Eq. (N. C.) 375; Smith v. Drew, 25 Grant (Ont.), 188; Trigg v. Read,5 Humph. (Tenn.) 529; Rochester v. Bank, 13 Wis. 432; Kenyon v. Welty, 20 Cal. 637; Hampton v. Nicholson, 23 N. J. Eq. 423; Peters v. Florence, 38 Pa. St. 191; Newell v. Stiles, 21 Ga. 118; Marble v. Whitney, 28 N. Y. 297.

DIRECTING VERDICTS.

As the practice now is, with reference to ordinary verdicts, when the evidence entirely fails upon one side, or on the other, is insufficient to found a verdict, it may appear presumptuous to point out any seeming errors. In the latter instance, when the evidence does not sustain the issue, the court would be, no doubt, justified in saying so to the jury. Courts have almost universally adopted the doctrine, that it lies within their province, when no evidence appears to counteract the allegations of one party, to direct the jury how their verdict shall be, or to withdraw the case entirely from their consideration. Suppose, for instance, an action is brought upon a promise, express or implied, to pay money, and the plaintiff alone testifies as to the indebtedness, and no evidence whatever is adduced for the defendant. In such cases, it never seems to be questioned but that the court has an absolute right to direct the jury to bring in a verdict for the plaintiff for the amount of his claim. No doubt there are excellent reasons why this should be so; but it is equally true, that excellent reasons why it should not be so, may be presented on the other side of the question. There seems to be no class of cases to which this power is confined; it seems to be widely employed in civil as well as criminal actions, but it is our purpose to inquire more especially with reference to the latter.

Amount of Evidence Necessary.—Just the precise amount of evidence which must be produced to warrant the judge in directing the verdict, has not been satisfactorily defined, but has been left more or less to the judge's discretion. Indeed, some courts have decided that where there is any conflict whatever in the evidence, the case must be submitted to the jury, since it is their province to decide facts and the credibility of witnesses. But the amount of evidence necessary to create a conflict is not determined. It is left to the court to decide whether or not there is a conflict in the evidence. In England, it is laid down that a scintilla of evidence would not justify the judge in leaving the case to the jury.[1] In the United States Supreme Court the rule is, that where there is a scintilla of evidence, the court will not be justified in taking a case from the jury. At first it would seem that there was a decided conflict between the earlier and later cases in this court; but since the former have been referred to as sustaining the latter, it must be apparent there was no intention to overrule them. [2]

In Pleasants v. Fant,[3] it is said, "if the court is satisfied that, conceding all the inferences which the jury might reasonably draw from the testimony, the evidence is sufficient to warrant a verdict for the plaintiff, the court should say so to the jury." In the same court, a defendant may, when the plaintiff closes his case, move the court to instruct the jury that the evidence is not sufficient to warrant a verdict, and the court say: "To grant such a motion is not discretionary, but is a matter of legal right whenever the court is of opinion that, assuming the plaintiff's evidence to be true, he has not presented a case which can sustain a verdict in his fa-

[1] Ryder v. Wombwall, L. R. 4. Ex. 38; Toomey v. London, etc. R. Co., 91 Eng. C. L. 150; Wheelton v. Hardisty, 92 Id. 262.

[2] Pleasants v. Fant, 22 Wall. 122; Commissioners v Clark, 94 U. S. 284; Schuchardt v. Allens, 1 Wall. 369; Drakely v. Gragg, 8 Wall. 268; Hickman v. Jones, 9 Id. 201; Insurance Co. v. Rodel, 95 U. S. 238.

[3] *Supra.*

vor."[4] There may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it.[5]

In taking a case from the jury, great care should be exercised in not interfering with the province of the jury. In Mason v. Lewis,[6] the court observes: "The case should not be taken from the jury if there is room for doubt as to the sufficiency of the evidence." The practice of directing a verdict, which is similar to non-suiting a plaintiff, when the evidence is all in, in favor of the party who may be entitled to it, does not seem to be questioned.[7] Except one or two cases which hold that even though there be no evidence upon the one side or the other, the case must be left to the jury.[8] And it has also been held that it is error to refuse a submission of the case to the jury, and to direct a verdict for the plaintiff when the only testimony introduced is that of the plaintiff.[9] Even the issue of negligence comes within the rule,[10] allowing the case to be withdrawn from the consideration of the jury, and that to act otherwise is to submit to the jury a question of law, and deprive the defendant of the right to have the judge determine the law.[11]

It is exceedingly difficult in any case, where there is little or no evidence, for the court to determine whether the case shall be submitted to the jury or taken from them, without deciding, to a greater or less extent, of the credibility of the witnesses who testified for the plaintiff or defendant. If the evidence should entirely fail to support the declaration, the power no doubt lies with the court to so instruct the jury. The question, then, for the court would be one of relevancy, not weight, which the court may pass upon at the close, as he may at any stage, of the trial. In all the cases cited to sustain the rule that the court has this power, no doubt the idea that the question was one of law was assumed without deep consideration. In the case we have instanced, if the court instructed the jury to find for the plaintiff, did he not pass upon the weight of the plaintiff's testimony, and thus invade the province of the jury? Presumptively they would regard it as true, still they would be free to disbelieve him if they chose. In the highest courts of the various States in our own country, the rule seems to be strongly upheld that where there is no evidence against the plaintiff or defendant, or where it is so deficient that the court would be justified in setting the verdict aside, the court may direct the jury how their verdict shall be.

Detroit, Mich. ADDISON G. MCKEAN.

[4] Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 205. See Rohey v. Cell, 85 Pa. St. 80.

[5] L. R. Priv. Counc. Ap. 335; Impo't Co. v. Munson, 14 Wall. 448; Parkes v. Ross, 11 How. 373; Merchant's Bank v. State Bank, 10 Wall. 637; Hickman v. Jones, 9 Id. 201; Commissioners v. Clark, 94 U. S. 278.

[6] 1 Greene (Iowa), 494.

[7] Laville v. Lord Farnham, 2 M. & R. 216; Nichols v. Goldsmith, 7 Wend. 160; Dryden v. Britton, 19 Wis. 22; Grand Trunk R. Co. v. Nichol, 18 Mich. 170; Hynds v. Hays, 25 Ind. 31; Callahan v. Warne, 40 Mo. 131, Singleton v. Pacific Ry., 41 Mo. 465; Smith v. Hannibal & St. Jo. R. Co., 37 Mo. 287; Stevens v. Brook, 2 Bush. 137; Cutler v. Hurlburt, 29 Wis. 164; Gra. & Wat. New Tr., 1214, note. To same effect is Fort Scott Coal Co. v. Sweeney, 15 Kan. 244; Steinmetz v. Wingate, 42 Ind. 574; Way v. Illinois Central R. Co., 35 Iowa, 585: Brooks v. Somerville, 106 Mass. 271; Huddleston v. Lowell Machine Shop. Id. 282; Carnes v. Platt, 7 Abb. Pr. (N. S.) 42; Thomasson v. Grace, 42 Ala. 431; Baily v. Kimball, 26 N. H. 351; Puley v. Little, 3 Me. 97; Mason v. Lewis, 1 Greene (Iowa), 494; Bragdon v. Appleton Fire Ins. Co.. 42 Me. 254; Ellis v. Ohio Life Ins. Co., 4 Ohio St. 628; Clason v. Bird, 2 Brew. (S. C.) 370; Woodward v. McReynolds, 1 Chand. (Wis.) 244.

[8] Oleson v. Hendrickson, 12 Iowa, 222; Birney v. Tel. Co., 18 Mo. 341.

[9] Hodge v. Buffalo, 1 Abb. N. Cas. 355. But see Miller v. Ins. Co., Id. 470.

[10] Dascomb v. R. Co., 27 Barb. 222.

[11] Carpenter v. Smith, 10 Barb. 663.

CRIMINAL EVIDENCE—MURDER—CORPUS DELICTI.

JOHNSON v. COMMONWEALTH.

Kentucky Court of Appeals, September 23, 1883,

Circumstantial evidence is competent to prove the *corpus delicti* in a trial for murder.

Edwards & Hazelip, for appellant; *P. W. Hardin*, for appellee.

EDMONSON, J., delivered the opinion of the court:

Appellant was convicted and sentenced to the penitentiary for life on the charge of murdering his child. The evidence is entirely circumstantial. Appellant left his father's house, having in his arms his two children, aged respectively three years and one year, with the avowed intention of going to Shakertown. He did not go in the direction of Shakertown, nor is there any evidence that he went there, but on his return to his father's

some three or four days after he had left, having with him only the elder of the two children, and being asked about the younger, replied, that he left it it with a certain widow woman near Shakertown. A brother of appellant then went to the house of the woman with whom appellant stated he had left the child, and ascertained that the child had not been left there. After these inquiries had been made, and the suspicion becoming general that the child had been murdered, appellant stated to a member of his father's family that he was going to Shakertown and get the child, but instead of doing so he went in another direction, under an assumed name, and when arrested denied his identity, and when told that he was charged with murdering his child, said: "They may try me and send me to the penitentiary, but they can't hang me unless they prove the child is dead."

The only question presented is, whether the *corpus delicti*, the fact that the crime of murder has been perpetrated, must be established by direct proof of the killing or by an inspection of the body? or whether the death may not be established by circumstantial evidence, as any other fact in the case is established? We think there can be no doubt that circumstantial evidence is competent to establish the fact that the person charged to have been murdered is dead. The production of the body is certainly the most conclusive, if not the best, evidence of that fact, but in the very nature of crimes this is always possible. He who meditates and perpetrates crime courts secrecy that punishment may not follow, however the necessity that circumstantial evidence should be admitted to establish the fact of death as of any other fact necessary to the development of the truth.

It is true that experience illustrates the danger of convictions for murder when the body of the person charged to have been murdered is not produced or accounted for, but a like danger arises when circumstantial evidence is admitted to establish the identity of the person who did the killing. It may be that the danger of an erroneous conviction would be greater in the first instance than in the last, but that can not affect the question of the competency of such evidence in such cases.

Under our system, where the jury are the tryers of the facts, the weight to be given to testimony is for the jury alone, the court being concerned only in seeing that improper testimony does not go to the jury, and that they are properly instructed in the law. Where there is evidence competent in its nature, tending to justify the conclusion at which the jury arrives, this court can not disturb the verdict unless the jury have not been properly instructed as to the law of the case.

The competency of circumstantial evidence to establish the fact of death is acknowledged universally, and under our code its conclusiveness is or the jury and not for the determination of the court. 1 Bishop on Criminal Procedure, sec. 1057; Commonwealth v. Webster, 5 Cush. 310; Slickney v. State, 7 Ind. 330; State v. Keeler, 28 Iowa, 553; Wells on Circumstantial Evidence, sec. 3, p. 162.

Judgment affirmed.

HOMESTEAD—DESCENT.

CANOLE v. HUNT.

Supreme Court of Missouri, October Term, 1883.

C. died intestate siezed and possessed in fee of a tract of land, which he held as a homestead, leaving a widow and one minor child, Robert, the plaintiff. The land in suit was duly set off to the widow and her said minor child, Robert, as a homestead. The widow subsequently married defendant, Henry Hunt, and defendant George W. Hunt is the only child of said marriage, *Held*, that said George W. Hunt has no right or claim to enter into the homestead and share with said Robert, so long as Robert continues a minor.

Error to Howard Circuit Court.

PHILIPS, Com., delivered the opinion of the court:

This is an action of ejectment begun in 1879, by Robert Canole, a minor, by guardian, to recover of defendants the following lands: Part of the northwest quarter of section 5, T. 48, R. 15, bounded as follows: Beginning at the half mile corner on the west side of the section, thence north 20, 30 chains to a stone, thence east 91.50 chains to a stone, thence south 29,10 chains to a stone, on the original bank of the Missouri river, thence south 87 1-2 chains to the beginning, containing 28, 35-100 acres, more or less. Ouster laid on the 20th day of August, 1878. The answer tendered the general issue. The case was tried on the following agreed statement of facts: It was admitted that John Canole, at the time of his death, was seized in fee and possessed of the tract of land described in plaintiff's petition: that the said John Canole left a widow, Mary Canole, and a minor child, Robert Canole, the plaintiff; that Charles B. Canole is the guardian of said Robert Canole; that defendant, George W. Hunt, is an infant, of whom Mark Jackman is guardian; that Mary Canole, widow, after the death of her husband, John Canole, married —— Todd, who left her, and the said Mary, without obtaining a divorce from said Todd, married defendant, Henry Hunt, and defendant, George W. Hunt, is her only child by said marriage with Henry Hunt. That said land described in plaintiff's petition was duly set off to said Mary Canole and her minor child Robert Canole as a homestead under the provisions of the statute, and while said Mary was the widow of John Canole. The order of court setting out said homestead was here read in evidence in words and figures following, to-wit: "Mary Canole v. David Pipes, administrator of the estate of John Canole, deceased.

In the Howard County Court, February 9, 1870, David Peeler, John Walker and Wm. H. Settle commissioners appointed at the last term of this court to set out to plaintiff a homestead, present their report, and it appearing to the court that the tract of land described in the petition and in said report filed, was valued by said commissioners at eight hundred and sixty dollars (860), and the sum is less than the value of a homestead allowed by law, and that the said commissioners have set out the whole tract as a homestead for said plaintiff, and her child Robert Lee Canole, according to the provisions of the statute in such cases. It is therefore ordered by the court that the report of said commissioners be and the same is hereby approved and confirmed and ordered to be recorded; and the tract of land described therein, set out to Mary Canole and Robert Lee Canole as a homestead, according to the statute aforesaid."

It was further admitted that defendants were in possession of the land in controversy at the commencement of this suit, and are now in possession, and that the value of the monthly rents is five dollars. The court found the issues for the plaintiff, and defendant brings the case here on error.

The question for decision on the agreed statement of facts has not been directly decided in this State, though the principle involved has, in effect, been settled. The homestead claim presented arose under the statute of 1865. The fifth section of the homestead act reads as follows: "If any such housekeeper or head of a family shall die leaving a widow or any minor children, his homestead to the value aforesaid, shall pass to and vest in such widow or children, or if there be both, to such widow and children, without being subject to the payment of debts of the deceased, unless legally charged therein in his lifetime; and such widow and children respectively, shall take the same estate therein of which the deceased died seized; provided, that such children shall by force of this chapter, only have an interest in such homestead until they shall attain their majority; and the probate court having jurisdiction of the estate of such deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto." From this section one thing is clear to my mind, that is, that the legislature did not intend to secure the privileges and benefits of a homestead exemption and estate to any other person or persons than the widow and minor children of the head of the family who died seized of such homestead. The manifest object was to preserve to the head of the family during his life, the enjoyment of the home property as a means of shelter and protection, also as a means of better securing the unity of the family. Its further purpose was, upon his death, to devolve the estate upon his widow and his minor children, just as he held it, and for the same benificent end—that of keeping the widow and dependent children together, by affording them a common shelter and common source of subsistence. No other children than *his* minor children are admitted to the homestead as such. No child by the wife by marriage, anterior or subsequent to her coverture with the owner of the estate, has any right or claim to enter into the homestead and share it with the children, so long as they are minors. Any other construction would thwart the intention of the statute and let in aliens, to the head of the family, to share with his offspring the home which the legislature declared shall be enjoyed by his widow in perpetuity, and his offspring during minority.

True it is, that under this statute the widow took a fee, and at her death the title would descend to her heirs, and not to her husbands—(Skouton vs. Wood, 57 Mo. 380), so that if at the time of her death, there had been no minor child of the husband, no doubt but her children whether of lawful or unlawful wedlock, would take the estate in fee, as of the mother, as tenants in common. But where there is a minor child as in this case, of the father, from whom comes the homestead, while the fee title is in the widow, the minor child is entitled to hold with her during his minority, and neither she nor those claiming under her can oust or resist the right of such minor. Judge Napton in Skouton vs. Wood, *supra*, while the point was not directly involved, nevertheless, expressed his view of this question as follows:

"Supposing her death to occur before the minor children (where there are any) attain majority, it would be a serious question as to where the title goes, but I suppose it would go to the surviving minor children, and on their majority to the heirs of the deceased." By the expression, to the heirs of the deceased, he meant evidently, the children of the deceased widow. In that case, the court held, that as the section in the statute of 1865, under consideration, was copied from the homestead law of the state of Vermont the legislature adopting it, are supposed to have been familiar with the construction placed upon the act by the supreme judicial department of that state, and by a well recognized rule of interpretation, such construction came within, and was in effect, adopted by our legislature when they re-enacted the statute. In Keys vs. Hill, 30 Vt. 760, decided in 1858, long anterior to the homestead law in question, the Supreme Court of that state, determined the character and quality of the estate taken by the widow and heirs and the right of one to hold in severalty. The proposition was sought to be established in that case, that the widow and children held as tenants in common, with all the incidents and rights which under the general law of property inhere to such estate—under the construction contended for in that case by the one party, as here the homestead estate could be cut into as many distinct equal fragments as there were children, and taken by each in severalty, though the widow might have no

other place or means of shelter, habitation or support. This, the court say was not to be maintained: But it is said: "We think the clear design of the law is to continue the homestead entire, as the home of the widow and children constituting the family of the husband, housekeeper, or head of the family, and that no right of the children become operative to sever or divert the homestead from full enjoyment and occupancy as the family home, so long as the widow, or widow and children, see fit to continue it as such family home. In other words, we think the homestead continues to stand the same in relation to the family of the deceased for the purpose of a home and support, upon and after the decease, as it did before and up to the time of the decease." As the co-relative of this construction it must follow that as the children cannot oust nor sever, as against the widow, neither can the widow while living hold to the exclusion of the children in severalty.

The practical operation of an effort to enforce the rule contended for by the appellant, will demonstrate its invalidity. It will not, I presume, be contended by the learned counsel for the plaintiff in error, that the death of the mother, terminated or in any degree lessened the estate of the minor under the homestead law. This child is equally interested with the after born child, in the fee estate inherited from the mother, so if there be a right of admission to the immediate possession of the premises by the after born child, to what share or interest is the child entitled? It cannot be an equal share with the first child, for he holds a homestead interest in addition to the undivided one half interest, with the latter child in the fee under the mother. As the homestead interest cannot be severed, but must be held and enjoyed in common as an entire estate, if the last child could maintain ejectment it would only be to the extent of being let in to hold as of the entirety, with the beneficiary of the homestead, when it has no right whatever in the property under the homestead law.

The construction of this act must, therefore, be that the right to hold and enjoy the estate was in no wise interrupted by the death of the widow. The first child during the minority, holds not the inheritance, but by virtue of the homestead law. And as the absolute fee, which the widow took was burdened with the homestead interest and right of the first child, and as the after born child is not claiming, nor indeed can claim any right under the homestead act as such, but solely by the law of descent from the mother it takes an interest in the fee, but burdened with the paramount right to the possession by the first child during minority. When the first child shall have attained its majority the homestead estate will be at an end; and both children will then and not before, as heirs of the common mother, take from her the estate in fee, as tenants in common. It follows that the conclusion reached by the Circuit Court was for the right party—and its judgment is affirmed.

Per curiam: For the reasons given in the foregoing opinion, the judgment of the Circuit Court is affirmed.

EXECUTION — LEVY ON PRINCIPAL—RELEASE—SURETY.

HYDE v. ROGERS.

Supreme Court of Wisconsin, October 23, 1883.

A judgment creditor having an execution against several defendants who are equally bound, may direct the officer holding the writ to make the amount out of such as he may see fit to proceed against. But where one of the defendants is a surety and the fact is known to the creditor, he can not voluntarily release a levy which has been made upon property of the principal debtor and proceed to make the judgment out of the surety. Such release operates as an extension to the principal and a subsequent release of the liability of the surety.

Appeal from Circuit Court, Waupaca County.

Barnes & Goodland, for appellant; *G. W. Cate* and *Weed & Lines*, for respondents.

TAYLOR, J., delivered the opinion of the court:

This action is brought by the appellant to restrain the sheriff of Outagamie county from seizing and selling his property to satisfy an execution in his hands, issued out of the circuit court of Waupaca county, upon a judgment rendered in favor of the Union National Bank of Streator, Illinois, against the appellant and F. M. Brown, Isaac Brown and Anna A. Brown, for the sum of $613,-44. The allegations in the complaint are, in substance, that the appellant, some time before the obtaining of the judgment in question, made a promissory note payable to the order of F. M. Brown & Co., and that said note was afterwards indorsed by said F. M. Brown and one Plumb, and sold to the National Union Bank of Streator, Illinois; that the note, not being paid when due, an action was brought thereon in the circuit court of Waupaca county, and judgment for the amount thereof was obtained against all the parties. It is further alleged that the defendants, F. M. Brown, Isaac Brown and Anna A. Brown, are members of and compose the firm of F. M. Brown & Co.; that after judgment was perfected upon said note, execution was issued thereon to the sheriff of Waupaca county, and that said sheriff levied upon the property of the said F. M. Brown & Co. of sufficient value to satisfy the same; that after such levy, and before sale, the said F. M. Brown & Co. paid the plaintiff bank the full amount of the judgment, but that for the purpose of defrauding the appellant they directed the sheriff of Waupaca county to return the execution wholly unsatisfied, and for the same purpose procured the plaintiff bank to assign the judgment to F. M. Brown, Jr., he being a clerk

in the employ of F. M. Brown & Co. The complaint also alleges that the appellant Hyde made and executed said note as an accommodation note for said F. M. Brown & Co., and without any consideration received from them, and for the sole purpose of enabling the said F. M. Brown & Co. to raise money on the same for their own purposes by the negotiation thereof. It then alleges the issuing of a second execution on said judgment, directed to the respondent Rodgers, sheriff of Outagamie county, and that the sheriff threatens to seize his property to satisfy said execution.

The relief asked is (1) that the judgment be declared fully satisfied, paid and discharged; (2) that all the defendants be perpetually enjoined from collecting any part of such judgment out of the property of the appellant; and (3) that a temporary injunction restraining all the defendants from collecting such judgment or any part thereof out of the property of the appellant, be issued during the pendency of this action.

The defendants' answer denies all the material allegations of the complaint; denies that the judgment or any part of it has been paid by the defendants or any of them; denies that any property belonging to the firm of "F. M. Brown & Co." was ever seized upon by the sheriff of Waupaca county upon the first execution issued on the judgment; alleges that the plaintiff bank, for a valuable consideration paid by the said F. M. Brown, Jr., assigned said judgment to him, and that he now owns the same; that the sheriff of Waupaca county was directed by the plaintiff in the action to release the property levied upon by virtue of the execution in his hands, and return the same unsatisfied; that he did so in pursuance of such direction, and that after the assignment of the judgment to Mr. F. M. Brown, Jr., he caused the second execution to be issued thereon, directed to Rodgers, sheriff of Outagamie county, with directions to make the amount thereof out of the property of the appellant, if sufficient could be found in his county for that purpose. The answer denies that the appellant made the note in question for the accommodation of F. M. Brown & Co., and alleges that it was made for his own benefit, and that the firm of F. M. Brown & Co. were not liable to pay any part thereof as between the appellant and said firm; in fact, claiming that the firm indorsed the note for the accommodation of the appellant.

The court found the following facts: (1) That the defendant Isaac Brown, at the time mentioned in the complaint and answer herein, was not a member of the firm of F. M. Brown & Co.; that said firm was composed of the defendants F. M. Brown and Anna A. Brown. (2) That the defendant F. M. Brown, Jr., at the time mentioned in the complaint and answer herein, did not have the care and management of the financial affairs of said firm of F. M. Brown & Co., and had no control over the business or affairs of said firm. (3) That on the 17th day of January, 1882, judgment was rendered in favor of the Union National Bank of Streator, Illinois, and against Welcome Hyde, F. M. Brown, Isaac Brown, Anna A. Brown and Samuel Plumb, for $613.44 as alleged in the complaint herein. (4) That thereafter execution was issued on said judgment, and placed in the hands of the sheriff of Waupaca county, and that said sheriff levied upon certain personal property by virtue thereof. (5) That the property so levied upon was not the property of the firm of F. M. Brown & Co., nor of any of the defendants in the judgment mentioned in the third finding. (6) That thereafter, and by the direction of the said Union National Bank of Streator, Illinois, the said sheriff of Waupaca county released his levy upon said personal property. (7) That on or about February 2, 1882, the said Union National Bank, plaintiff in said action, duly assigned said judgment to the defendant F. M. Brown, Jr. (8) That at the time of said assignment the sheriff of Waupaca county held no property of the defendants, or either or any of them, under an execution issued on said judgment. (9) That no beneficial interest or consideration was ever received by the defendants herein, or any or either of them, for or on account of the note upon which said judgment was based, or the indebtedness represented by said note.

It is evident that upon these findings of fact the plaintiff was not entitled to the relief demanded in his complaint. In order to entitle the plaintiff to the relief demanded in his complaint, it was necessary for him to show either that the judgment had been in fact paid and satisfied by the other defendants, or by some of them, or that he stood in the relation of surety on the note upon which the judgment was rendered for the other defendants in the judgment, or some of them, and that such fact was known to the plaintiff; that, knowing such fact, he had issued an execution on the judgment, and such execution had been levied upon sufficient property of the other defendants, towards whom the plaintiff held the relation of surety to satisfy the same, and that, after such levy having been made, he released such property so levied upon, and ordered the execution returned unsatisfied.

It is a well-settled rule that the judgment-creditor, having a judgment against several defendants, may direct the officer holding the execution to make the amount of the same out of the property of such of the defendants as he may see fit to proceed against. Smith v. Erwin, 77 N. Y. 466; Root v. Wagner, 30 N. Y. 17; Walters v. Sykes, 22 Wend. 566; Gorham v. Gale, 7 Cow. 739; Corning v. Southland, 3 Hill, 552; Crocker, Sheriffs, sec. 407; Freem. Ex'ns., sec. 271; Id., 209-210.

Of this rule the defendants who, as between themselves, are equally bound to pay the debt, can not complain. As between them and the judgment-creditors each is bound to pay the whole debt, and it is no ground for complaint that the creditor may see fit to collect the debt out of the property of one and not out of the property

of another. The mere seizure of the property of one of such defendants does pay or satisfy the judgment, and if the property seized is released and returned to the possession of the owner at his request, it is clear that he can not set up such seizure as a payment or satisfaction of the judgment. Freeman Judgments, sec. 475; Herm. Ex'ns, 253-257; Smith, Sheriffs, 340-341, and notes; Crocker, Sheriffs, sec. 432; People v. Hopson, 1 Denio, 574; Peck v. Tiffany, 2 N. Y. 451; United States v. Dashiel, 3 Wall. 688. An exception to this rule is made in favor of a defendant who stands as surety for the other defendants or some of them; and when such fact is known to the judgment-creditors, and the property of the defendants, who, as principal debtors, ought to pay the debt, has been seized upon the execution, he can not voluntarily release such levy and then resort to the property of the surety. In analogy to the rule which releases the surety by an extension of time of payment to the principal debtor, the release of such levy works as an extension of time of payment to such principal debtor, and the surety is thereby released; and the other rule which prohibits the creditor from releasing any security he may have in his hands received from the principal debtor without the consent of the surety. Farmers' and Mechanics' Bank v. Kingsley, 2 Douglas (Mich.) 379, 402, 403; Mulford v. Estudillo, 23 Cal. 94; People v. Chisholm, 8 Cal. 30; Finley v. King, 1 Head, 123; Herm. Ex'ns, sec. 176, p. 255; Herm. Judgm. sec. 475, p. 501; Howerton v. Sprague, 64 N. C. 451; Bank v. Edwards, 20 Ala. 512; Dixon v. Ewing's Admr., 3 Ohio, 280; Com. Bank v. Western Reserve Bank, 11 Ohio, 444; Phares v. Barbour, 49 Ill. 370; Thomas' Exr. v. Cleveland, 33 Mo. 126; Mayhew v. Crickett, 2 Swanst. Ch. 185.

The court has failed to find that the appellant stands in the relation of surety to the other defendants. This fact lies at the foundation of the plaintiff's claim to be released from the payment of the judgment. The appellant did not ask for a finding in the court below in his favor upon that point. He contented himself with excepting to the findings of the court, but made no request for any other findings. It is doubtful, therefore, whether on this appeal we ought to look into the evidence for the purpose of ascertaining whether such fact was proved. Nor is there any finding that the judgment was paid by the other defendants. There is nothing in the findings which can be made the basis for a judgment in his favor.

If we look into the evidence contained in the record we are unable to say that the preponderance of evidence shows that the appellant was the surety of the other defendants, nor that the judgment was paid by the other defendants; nor is there any evidence tending to show that the plaintiff bank had any knowledge that the appellant was an accommodation maker of the note upon which the judgment was rendered.

Whether the property levied upon by virtue of the first execution was the property of the firm of F. M. Brown & Co. is, as the case now stands, wholly immaterial. If the plaintiff's right in this case depended upon that finding, we might be inclined to overrule the finding of the learned circuit judge upon that point.

The finding that the defendant Isaac Brown was not a member of the firm of F. M. Brown & Co. for the purposes of this action, was probably a mistake, as the judgment was obtained against him at a member of such firm. and he can not in this action dispute that judgment. These mistakes of the learned circuit judge—if they are mistakes—do not help the appellant's case, admitting that they were both fairly established by the evidence; still the judgment of the circuit court dismissing the plaintiff's complaint was right, and must be affirmed.

The judgment of the circuit court is affirmed.

CORPORATIONS — LIABILITY OF DIRECTORS FOR NEGLIGENCE — APPORTIONMENT OF RESPONSIBILITY.

ACKERMAN v. HALSEY.

New Jersey Court of Chancery, May Term, 1883.

1. A bill was filed by a stockholder of a National bank against the president and directors, alleging gross neglect of duty and mismanagement in permitting the cashier to misappropriate over two millions of dollars, where reasonable care would have prevented it. The bill alleged in detail that the directors utterly neglected to discharge any of the duties of their office; that the bank had been ruined; that the complainant had lost his stock and been obliged to pay an assessment; that a receiver had been appointed, and that he had failed to bring suit, although requested so to do by the complainant. On demurrer *held*, that such a bill would lie.

2. The directors are bound to use reasonable diligence, such as men usually exercise in the management of their own affairs of a similar nature, but they are personally liable if they suffer the corporate funds or property to be wasted by gross negligence and inattention to the duties of their trust.

3. Each director will answer only for the period of his own administration, and in making its decree the court will discriminate between those who are culpable and those who are not.

4. The court can assess damages for negligence in such a case as this.

5. Such a bill may be filed by a stockholder after the receiver has refused to sue. The receiver must be a defendant, and the bill must be for the benefit of all stockholders and creditors.

Bill for relief. On general demurrer.

Mr. J. W. Taylor, for Joseph A. Halsey, Joseph S. Halsey, George A. Halsey, Edward H. Wright and Lewis C. Grover; *Mr. A. P. Condit*, for William Clark; *Mr. J. Henry Stone*, for Henry C. Howell; *Mr. Cortlandt Parker*, for Stephen H. Condict; *Mr. Carl Lentz*, for Joseph Hensler; *Mr. J. H. Ackerman*, for complainant.

THE CHANCELLOR: The bill is filed by Warren Ackerman, a creditor and stockholder of the Mechanics' National Bank, of Newark, against the persons who were at the time of the failure of that bank its directors. The receiver is also a defendant. The suit is brought for the benefit of the complainant and all other creditors and stockholdeas of the corporation who may come in and contribute to the expenses of the litigation. The bill alleges that the bank is, and for more than fifteen years before the filing of the bill was, a corporation under the national banking act; that seven of the defendant directors, Joseph A. Halsey, Stephen H. Condict, George A. Halsey, Lewis C. Grover, Oscar L. Baldwin, William Clark and Edward H. Wright were duly elected to their offices first in 1873; another, Joseph S. Halsey, in 1878, and the other two, Henry C. Howell and Joseph Hensler, in 1879; and that each of the ten duly accepted the office, and immediately after his election took and filed the oath prescribed by the act, that he would, so far as the duty devolved on him, diligently and honestly administer the affairs of the bank, etc.; that from year to year, from the time of their first election down to the time of the failure of the bank, they were duly and regularly elected directors and took and filed that oath; that they are still directors of the bank, and are the sole surviving ones; that they were its directors and managers while its money and funds were being abstracted and misapplied by the cashier as stated in the bill; that the bank failed in October, 1881; that its capital stock was $500,000, divided into 10,000 shares of $50 each; that the complainant, before 1873, became, and still is, the owner of 155 shares of stock, and continued to be so by reason of his reliance on the fact that the defendant directors were such, and on their reports published from time to time, from the organization of the bank, of the financial condition of the institution; that these reports which were signed by them, or by some of them, stated in substance that the capital was unimpaired and that the bank had also a large surplus over and above the payment of its debts and liabilities, and was in a sound and solvent condition, while, in fact, it had no surplus for several years before its failure, but was insolvent.

The Chancellor then proceeded to say that the bill also states that if the directors had discharged their duties, the most ordinary inspection of its affairs would have revealed to them its true condition and the fact of the abstraction and misappropriation of its funds by its cashier, and that it proceeds to set forth in detail the various duties of the president and directors, and their opportunities for performing their duties, and that a very moderate exercise of their duties would have prevented the ruin of the bank, and that they utterly failed in their duties, and that the president was so culpably delinquent that he most negligently permitted the cashier to have control of the affairs of the bank, and to use and lend its money as he saw fit, without security, and that the cashier, aided by such negligence, abstracted and misapplied the funds of the bank to an amount exceeding $2,000,000, which has completely ruined the bank and rendered the stock worthless; that the directors were equally negligent and permitted the property of the bank to be in the full control of dishonest persons and permitted the property to be wasted and stolen; that the president was elected and kept in office and paid for his services (which the bill says were merely nominal), for more than ten years, although the directors knew he was wholly incompetent; that they employed a person as cashier who abstracted and misappropriated the funds to the amount of over $2,000,000, and required of him no security except a bond of $20,000, which was allowed to become "outlawed" by not being renewed for fifteen years, and that they suffered the accounts to be falsified, specifying items; that they accepted false statements of the cashier, which the least examination would have shown to be false; that they paid dividends when the bank was insolvent; that they permitted irresponsible persons to overdraw their accounts to a large amount without security, by reason whereof the money was lost; and that they transmitted false statements to the Comptroller of the Currency and caused them to be published up to the 6th of October, 1881; and that at no time was there had by the directors, or under their direction, a careful, thorough and complete examination of the affairs of the bank. That the bill states that in October, 1881, the Comptroller of the Currency appointed a receiver, and that it became necessary for the receiver to make an assessment on the stockholders of the full amount of their stock, and that the complainant had been compelled to pay $7.839.17; that the complainant also alleges that he, by the mismanagement of the directors, sustained damage to the amount of $15.589.17 with interest, and that each of the stockholders has sustained damage to double the par value of his stock; and that before the commencement of this suit, the complainant requested the receiver to recover the damages which had been sustained, but that he refused to do so; and that the prayer of the bill is, that the damages of the creditors and stockholders might be ascertained, and the defendant directors adjudged to pay them to the receiver for the benefit of the creditors and stockholders; or that the complainant might recover against them his damages as a stockholder; and that the other creditors and stockholders might have such relief as they are entitled to; and that the defendant directors all filed general demurrers.

The Chancellor then continued as follows: That the subject of this litigation is within the jurisdiction of this court will admit of no question. The suit is brought by a creditor and stockholder of the bank against the directors to obtain redress for the waste of the entire capital and surplus of the bank whereby he has been subjected to loss as a creditor of the bank, and has as a stockholder lost not only his stock, but also a sum

of money equal to its par value. The ground of the claim is, that the directors utterly neglected to discharge any of the duties of their office. For such a wrong there is a remedy in equity. For any wilful breach of their trust or misapplication of the corporate funds, or for any gross neglect of, or inattention to their official duties, directors are liable in this court. Field on Corp., 173; Ang. & Ames on Corp., 312; Citizens Loan Association v. Lyon, 2 Stew. 110; Robinson v. Smith, 3 Paige, 222; Citizens Building Association v. Bostwick, 38 N. Y. 52; Trustees v. Bosseiux, 3 Fed. Rep. 817. And the liability is to the corporation in the first instance where the corporation is capable of acting; but if it refuses to do so, then a person aggrieved may bring the suit. If the corporation be insolvent, and its affairs in the hands of a receiver, he may maintain the litigation. If he refuses, or is himself involved, a person aggrieved may sue. Chester v. Hilliard, 7 Stew. Eq. 341; Brinckerhoff v. Bostwick, *ubi sup.* That is to say, primarily the corporation, or, if insolvent, its representative, must sue, but, in case of their disability or refusal, a person aggrieved may bring the suit, making the corporation or its representative a defendant. Here the corporation is insolvent and there is a receiver. Under the national banking law he would have been the proper person to bring the suit if he would. Conway v. Halsey, 15 Vr. 462; Brinckerhoff v. Bostwick, *ubi sup.* He, however, refuses to do so. The bill states generally that the defendant directors have utterly neglected to discharge their duties in every essential respect. It was that they "had the fullest opportunities and facilities for, and abundant means of honestly and diligently performing their duties, and of and for knowing at all times the exact condition of the affairs of the bank, and of and for administering its affairs honestly and diligently as required by their oath, and for preventing the loss and injury complained of, and that a very moderate exercise and performance of the duties expected and required of them would have prevented the ruin of the bank and the consequent injury to the complainant, but that they utterly failed and neglected to perform their official duties and wholly omitted, without any reasonable excuse, to give any reasonable or proper personal attention to the business of the bank and the care and management of its concerns, and that in consequence of such neglect, the bank has been utterly ruined by having its funds abstracted and misapplied by its cashier, and its stock rendered worthless to the injury of the complainant and its other creditors." It proceeds to state particular derelictions of duty. These are the negligent abandonment of the control of the whole of the affairs of the bank to the cashier without requiring any security from him for the honest and faithful performance of his duties, by which means the funds and property of the bank were abstracted and misapplied by him to the amount of over $2,000,000, to the complete ruin of the bank; carelessly permitting the money, property and effects of the bank to be in the possession and under the control of dishonest and incompetent persons without security; carelessly permitting the property, money and effects of the bank to be stolen, wasted and squandered; employing for many years an incompetent person for president; permitting the accounts to be falsified; accepting the cashier's false statements of the condition of the bank without examination as to their truth or correctness; paying dividends when the bank was insolvent without seeking to know its true condition; negligently permitting the money of the bank to be lent to irresponsible persons without adequate security, to the loss of the bank; permitting irresponsible persons to overdraw their accounts without security, whereby the bank lost large sums of money; accepting and certifying and publishing the false reports of the cashier to the Comptroller of the Currency, and never making, or causing to be made, any careful, thorough or complete examination of the affairs of the bank so as to know whether its affairs were being honestly and diligently administered.

As a general rule, the directors of a corporation are only required in the management of its affairs to keep within the limits of its powers, and to exercise good faith and honesty. They only undertake, by virtue of their assumption of the duties incumbent on them, to perform those duties according to the best of their judgment and with reasonable diligence, and a mere error of judgment will not subject them to personal liability for its consequences. And unless there has been some violation of the charter or the constituting instruments of the company, or unless there is shown to be a want of good faith, or a wilful abuse of discretion, there will be no personal liability. They are personally only bound in the management of the affairs of the corporation, to use reasonable diligence and prudence such as men usually exercise in the management of their own affairs of a similar nature. Field on Corp., 169, 171; Ang. & Ames on Corp., 314; Spering's Appeal, 71 Pa. St. 1; Overend & Gurney Co., L. R. (95 H. of L.) 480; Hodges v. N. E. Screw Co., 1 R. I. 312; Citizens Building Association v. Coriell, 7 Stew. Eq. 384. But they are personally liable if they suffer the corporate funds or property to be wasted by gross negligence and inattention to the duties of their trust. Robinson v. Smith, *ubi sup.*; Citizens Building Association v. Coriell, *ubi sup.* The case made by the bill is one of absolute neglect by the defendant directors of all the essential duties of their office. Conceding that the specific violations of duty pointed out might not of themselves, if they stood alone, suffice to fix personal liability; in connection with the general statement and charge of absolute neglect of all essential duties, they obviously assume a different character; for the allegations are to be taken all together, and the specifications are to be considered in the light of the general statement that the directors wholly neglected their duty. The allegations of the bill

are sufficient to fix personal liability upon the directors. The case made by them is one of the most absolute and unqualified inattention and neglect of duty.

It is urged that the bill, while it states that false reports of the solvency and flourishing condition of the bank were made from the time of its organization, also states that the bank was insolvent during all that time; and it is urged that if it be true that the bank was insolvent from its organization, no harm was done to the complainant by the false reports. But the statement of the bill is not that the bank was insolvent from the beginning, but for several years before its failure. The injury done by false reports to the creditors and stockholders is that persons are led to give the bank credit to their ultimate loss, and that of the stockholders. The false reports work also another injury to the stockholders. They not only disarm suspicion, but inspire the stockholders with confidence in the management of the affairs of the institution, and so induce them to keep the directors in office until the disaster comes and the bank is perhaps utterly ruined. They also avert the scrutiny of the Comptroller of the Currency. It is also urged that the statement that the cashier's bond was barred by limitation because not renewed for fifteen years, is on its face a misstatement from mistake of law. But the statement is an immaterial one; the charge and allegation in connection with which it is made is, that the directors required no security of the cashier. It remains to consider the objection made by Messrs. Joseph S. Halsey, Howell and Hensler, that the bill charges misconduct which occurred before they were members of the board, and hence they claim that it is, as to them, multifarious. But in a bill of this peculiar character, where the management of the affairs of a corporation through a series of years is the subject of litigation, and it appears on the face of the bill when the administration of each director began, the objection in question is not possessed of much weight. Each director will answer only for the period of his administration, and in making its decree, the court will, of course, discriminate between those who are culpable and those who are not. Citizens' B. & L. Association, *ubi sup.* In Charitable Corp. v. Sutton, Atk. 401, a similar objection was made and considered. The suit was brought to be relieved against the defendants, fifty in number, who were either committee men or in other offices of the corporation, and to obtain satisfaction for a breach of trust, fraud and mismanagement. It was there urged that the court could make no decree against the defendants which would be just, for it was said that every man's attendance or omission of his duty, was his own default, and that each particular person must bear such a proportion as would be suitable to the loss arising from his particular neglect, which made it, it was argued, a case out of the power of the court. The objection was not sustained. Lord Hardwicke dismissed the bill as to some of the defendants. As to others, he decreed that they were liable in the first place, and their associates secondarily liable.

Another objection is made, that this court can not assess damages for negligence. That proposition is not true where there is no adequate remedy at law. There can be no question that this court will assess damages against a trustee for culpable negligence in the performance of his duty, whereby he failed to receive such profits upon the trust estate as he otherwise would have done. Osgood v. Franklin, 2 Johns. Ch. 1; Melick v. Voorhees, 9 C. E. Gr. 305. If this court has jurisdiction in such a case as this, as it undoubtedly has, it must have the power to assess the damages against the defendants. Charitable Corp. v. Sutton, *ubi sup.*, is an instance of the exercise of the power. Of course all the cases in which it has been held that suit may be maintained against directors for such redress as is sought in this suit, are necessarily instances of the exercise of the power.

The demurrers will all be overruled with costs.

WEEKLY DIGEST OF RECENT CASES.

1. EXTRADITION — HABEAS CORPUS.

1. Requisition not affected by change in Governors. It is not material whether a requisition demanding a fugitive from justice was issued by a Governor in office at the time of its presentation. The requisition is the act of the Governor and not the individual who holds the office. When issued by the Governor of a State, it will remain in force until recalled or revoked by same authority. 2. Conventional, and can only be enforced upon the terms provided. Aside from the constitution and statutes enacted pursuant thereto, there is no provision for the extradition of fugitives from justice. The States are separate and independent sovereignties, and the criminal laws of one cannot be enforced in another; and but for the conventional arrangement, amounting to a treaty stipulation in the constitution of the United States, a fugitive from justice could not be extradited. A strict compliance with the laws regulating the question is necessary to authorize the Governor to issue his warrant for the arrest and return of a citizen, upon the requisition of the Governor of another State. A requisition which is not accompanied by a copy of an indictment or affidavit certified by the demanding Governor to be authentic, will not authorize the Governor of this State to issue his warrant under the extradition laws. The Gov-

ernor in such case has no authority except that given by the statute. 3. *Habeas corpus.* In case of one charged with crime in a foreign State, and brought into Court upon *habeas corpus*, the matter must be determined upon the facts in the return shown to have existed at the time of the service of the writ, and not upon facts which occurred subsequent thereto. *Knowlton's Case*, S. C. Denver, Colorado, Nov. 15, 1883; 4 Col. L. Rep. 193.

2. ATTORNEY AND CLIENT — NEGLIGENCE — EVIDENCE.

Appellee sued upon the following instrument: "Received of Mrs. Diana Falls one note against Z. P. Estes for $1,100. * * This for collection. H. A. Foulks." Appellee alleged that she instructed the appellant to attach the land of Estes in Knox county, which he failed to do, whereby she lost her debt. While the instrument has the elements of a receipt, taken in all it parts it expresses a contract for the collection of the note, and had it been signed by appellant as an attorney it would upon its face express an attorney's contract for the collection of the note. (3 Johns, 185; 72 Pa. S. 124; 13 Am. R.. 665; 47 Wis., 615.) As it was not signed by appellant as an attorney, parol evidence was admissible to show in what capacity he signed it. (Abb. Trial Ev., 280, 294; 56 N. Y., 574; 38 Ind., 162; 53 id., 575; 68 id., 548.) But conceding that he executed the contract as an attorney, it imposed upon him the duty of skill and diligence, but it also imposed upon appellee the duty of furnishing the necessary bond and making the required affidavit for an attachment. The contract did not impose on appellant the duty of making the affidavit and bond, nor would p sitive instructions from appellee requiring such services have imposed such duty. In a proper case an attorney may be made liable for a failure to prepare the affidavit and bond in attachment; for the failure to give proper advice or the giving of erroneous advice in relation to such procedure. But here the claim was solely for a failure to institute attachment proceedings, and it is not shown that appellee ever offered to make the necessary affidavit or to furnish the bond. Appellant was not, therefore, liable for not bringing an attachment suit. *Foulke v. Falls*, S. C. Ind. Nov. 20, 1883.

3. CRIMINAL LAW—ALIBI—DYING DECLARATIONS.

The commission of a criminal offense implies the presence of the defendant at the necessary time and place. Proof of an *alibi* is, therefore, as much of a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with the other facts of the case, raise doubt enough to produce an acquittal. A reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime, would seem necessarily to raise a reasonable doubt of his commission of it. Proof tending to establish an *alibi*, though insufficient of itself to establish that fact, is not to be excluded from the case. Whatever doubt, if any, such testimony may raise in the minds of the jurors, is for their consideration; and if its weight alone or added to that of other evidence in the case, be sufficient to reduce belief in their minds as to the defendant's guilt, to a reasonable doubt, they should acquit, for in every criminal case, when all the proof is in, the final question for the jury is, are all the essential averments of the indictment proved beyond a reasonable doubt? Dying declarations are restricted to the act of killing and to the circumstances immediately attending it and forming a part of the *res gestæ*. When they relate to former and distinct transactions, they do not come within the principle of necessity on which such declarations are received. *People v. Fong Ah Sing*, S. C. Cal., Oct. 26, 1883; 12 Pac. C. L. J., 263.

4. HOMESTEAD—HUSBAND AND WIFE.

B conveyed to his wife the homestead; afterwards they acquired another homestead. The first was levied upon and sold under a judgment and execution against the husband. In a suit for the land, *held*, that if the property was homestead at the time of the conveyance, the true issue would be as to whether the same was intended to and did pass the title to the wife, or whether it was simulated or colorable. In the first instance, the conveyance would be valid as to existing creditors, for the reason that the property being exempt from forced sale, the conveyance did not take from their reach any property that they could subject to their claims. But in the second instance, the title in fact would still be in the grantor, and when disrobed of its homestead character by abandonment or otherwise, it would be subject. *Baines v. Baker*, S. C. Tex., Tyler Term, November, 1883; 2 Tex. L. Rep., 430.

5. USURY.

Where a purchaser executes his note for the purchase-price of land with interest, until maturity, at a rate greater than the legal rate, the contract is not usurious, the rate of interest being part of the consideration paid for the land; but if the note bear interest at such rate, after maturity, it is usurious, the interest becoming then the consideration for for bearance to demand the money already due. A claim should be purged of usury, whether usury has been pleaded or not. *Warton v. Warton*, Ky. Ct. App., Oct. 17, 1883; 5 Ky. L. Rep., 302.

6. SPECIFIC PERFORMANCE — INCOMPLETE TITLE AFTERWARDS PERFECTED.

Where a bill in equity was filed to compel the specific performance of an agreement to purchase lands, and it appeared that the complainant had not been able to give a perfect title at the time agreed, and that after an extension of thirty days he was still unable, but afterwards he brought this suit to compel the defendant to accept the title, and on the trial tendered a good title, *held*, that the defendant was justified in rejecting the title when it was tendered, and that, even if the complainant were able at the time of the trial to give perfect title, it would not be doing equity to compel the defendant to accept it after nearly two years had elapsed since the day named in the contract for passing the title. *Fox v. Phelps*, U. S. C. C., E. D. N. Y., June 29, 1883; 10 Fed. Rep., 120.

7. NEGOTIABLE PAPER—INDORSEMENT—BONA FIDE PURCHASER—DEFENSES.

It is a settled doctrine of the law merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities existing between the payor and payee. But if it be not so indorsed, the purchaser becomes only the equitable owner of the claim or debt evidenced by the security. As a general rule, the legal title to negotiable paper, payable to order, passes only by the payee's indorsement on the security itself

The only exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become a part thereof or be incorporated into it. Words of mere assignment and transfer of negotiable paper contained in a separate instrument, executed for a wholly different and distinct purpose, are not equivalent to an indorsement within that rule which admits the payor to urge, as against the holder of an unindorsed negotiable security payable to order, any valid defense which he has against the original payee. A subsequent indorsement of negotiable paper after notice of the payor's defense, though the paper was purceased without notice of such defense, will not relate back to the time of purchase so as to cut off the equities existing between the payor and payee. *Osgood v. Artt*, U. S. C. C., N. D. Ill.; 17 West. Jur.,463.

8. PRINCIPAL AND AGENT—INSTRUCTIONS—VERDICT—NEW TRIAL.

The unauthorized act of an agent, when ratified by the principal, is equally binding as though embraced within the scope of the agent's power; and when the issue in a cause turns upon the authority of an agent, and there is testimony tending to prove the ratification of the act of such agent, the verdict of a jury finding such act to be the act of the principal, will not be disturbed. It is the duty of a court to instruct the jury in the law of the case, whether requested so to do by counsel or not; and when it fails to do so, and the jury find a verdict which, upon a view of the whole case, appears to be wrong, such verdict will be set aside and a new trial ordered; but otherwise, when, upon a general view of the case, the verdict seems to be right. *Sandwich, etc. Co. v. Shiley*, S. C. Neb., Nov. 13, 1883; 16 N. W. Rep., 267.

9. TRUST—PURCHASE BY TRUSTEE.

A trustee cannot become the owner of the trust estate, except where it is clear that the *cestui que trust* intended that the trustee should buy, and the transaction is beyond suspicion; and the burden is on the trustee to establish the latter fact. *Lathrop v. Pollard*, S. C. Colorado, 1883. 16 The Rep., 650.

10. NEGOTIABLE PAPER—AGENCY—BANKS.

Naming a bank as the place of payment of a promissory note, bill of exchange, or other obligation, does not make the bank an agent for the collection of the paper or the receipt of the money due on it; and the debtor cannot make the bank the agent of the holder by depositing with it the funds to pay the paper. If maturing paper be left at a bank for collection, the bank becomes the agent of the holder to receive payment. But unless the bank has been made the agent of the holder by indorsement of the paper or the deposit of it for collection, any money which the bank receives to apply in payment of it, will be deemed to be money taken by the bank as the agent of the payer, and the loss sustained by the failure of the bank with the funds so deposited in hand, will be the loss of the payer. *Adams v. Hackensack etc., Co.*, N. Y. Ct. Errors and Appeals, Nov. 1883; Journal of Banking Law.

11. LIFE INSURANCE—POLICY—SUICIDE—BURDEN OF PROOF.

In this action which was upon a policy of life insurance containing a proviso that it should be null and void in case the insured "shall, under any circumstances, die by his own hand," issue was joined as to whether his death was within the proviso. *Held:* 1. Whilst it is competent for the parties by plain stipulation to qualify or restrict the popular meaning of words in a policy, yet a proper construction of the words of the proviso requires that the words, "under any circumstances," be disregarded as too general and indefinite. 2. Where, as in this case, there is no qualification to the expression, "shall die by his own hand," the popular and legal definition will obtain; and the death of the insured by his own act, is not within the proviso, if, at the time, he was under the controlling influence of insanity, although he intended to take his life and understood the physical nature and effect of his act. 3. On the trial, the *onus* is upon the company to show that the death was within the proviso. 4. The testimony having been given by the company tending to show that the insured committed self-destruction, it was competent for the plaintiff in rebuttal to give testimony tending to show the insanity of the insured at the time of committing the act. *Schultz v Insurance Company*, S. C. Com. Ohio, Oct. 23, 1883; 4 Ohio L. J., 514.

12. CORPORATION—LIEN—ENDORSER—SUBROGATION.

The charter of a joint stock company provides for the payment of $5 per share when the subscription is made, and the residue thereafter as may be required by the president and directors. By a by-law of the company each stockholder is required to give his note, satisfactorly indorsed, for his unpaid stock. *Held*, that a stockholder having given his note with an indorser for his unpaid stock, the amount due thereon is still a lien on the stock, and the indorser is entitled to have the stock applied to his relief. *Petersburg etc. Co. v. Lamsden*, S. C. Va., November, 1883, 3 Journal of Banking Law, 83.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 76. [17 Cent. L. J. 399.] A standing account is existing between A and B. They met on August 4th, and balanced accounts, in which B owes A $1.75, pays him, and B gives A a receipt in full up to date. Afterwards B finds that A owes him $4.80, and brings suit before magistrate to set aside the settlement, and gives him judgment for $4.80, claiming the error was made in settlement. Query: Has a justice of the peace jurisdiction in such case, and is it not an equitable proceeding? X.

Higginsville, Mo.

Answer No. 1. "A settlement is conclusive, and can only be opened on the ground of fraud, or for errors or mistakes." Kronenberger v. Binz, 56 Mo. 122. A proceeding to open the settlement is purely equitable, and the justice of the peace has no jurisdiction. Moore v. McCullough, 8 Mo. 402; Story's Eq. Jur. (4th ed.) 586; Bispham's Prin. Eq. (2d ed.) 530, 531.

Kansas City, Mo. C. W. F.

Answer No. 2. Like a settled account, it is only *prima facie* evidence of what it purports to be upon the face of it, and upon satisfactory showing being made, that it was obtained by fraud, or was given under a mistake, either of facts or under ignorance of legal rights of the party who gave it, it may be inquired into and corrected in a court of law as well as in a court of equity. When this is made out by evidence, it then appears that beyond the sum actually paid, it was given without consideration, but the want of consideration must be made clearly to appear by the party who attempts to impeach the validity of the receipt; if that is not done, the presumption is in favor of the written receipt. See Thompson v. Fauset, 1 Pet. 183; Harden v. Gorden, 2 Mass. 541; Elwell v. Lessley, 2 Halst. 349. The case of receipts is exempt from the application of the rule that parol evidence is not admissible to vary or contradict a written agreement, for a receipt is not evidence of a contract, but a payment, and it has always been permitted to show that something short of the actual terms of the receipt was intended, it being conclusive only as to the amount of money paid; and not even for that, provided any mistake can be shown to have taken place in the adjustment between the parties. See Stackpole v. Arnold, 11 Mass. 26; Hunt v. Adams, 7 Mass. 518; Parker v. Prentiss, 6 Mass. 430; Watson v. Blaine's Ex'rs., 12 S. & R. 131; Jorden v. Cooper, 3 Id. 464; Hamilton v. McGuire, 3 Id. 355; Oniel v. Lodge, 3 Har. & McHen. 433; Heilner v. Imfrie, 6 S. & R. 410; McDermot v. United States Insurance Co, 3 Id. 607; Miller v. Heller, 7 Id. 86; Corbit v. Lucas, 2 Bail. 186; Joyner v. Cooper, 2 Bail. 179; Stephenson v. Rogers, 2 Hill, 291. The jurisdiction of justices depending upon the statute in all cases, so in civil cases, it is regulated by a certain amount of debt or damage, and if it does not extend beyond $6.55, it must be a limited jurisdiction indeed; if the whole debt amounted to $6.55, and after deducting the amount of said receipt, $1.75, a judgment was rendered for plaintiff in the sum of $4.80, it was strictly in accordance with law, and is so ably supported by the above authorities.

Grand Rapids, Mich. T. H. GIRARD.

Answer No. 3. The receipt is subject to explanation. Even an agreement to take $1.75 for the debt would be void. A justice has exclusive jurisdiction. Riley v. Kershan, 52 Mo. 224; 17 Cent. L. J. 302.

Query 77. [17 Cent. L. J. 399.] A, a married man, gets a divorce, *a vinculo matrimonii*, from B, his wife, who owns real estate. They have children, born alive, capable of inheriting. Does A lose his estate by the courtesy in his wife's land *per force* of the decree of divorce, or does divorce bar cortesy in the husband as against the wife?

Marion, N. C. B. D. S.

Answer No. 1. In this country, the effect of divorce *a vinculo* is generally regulated by statute. But, independently of statutory provisions, rights dependent on marriage and not actually vested are ended by an absolute divorce. Schouler, Husb. and Wife, § 559.

An absolute divorce destroys and annuls the marriage relation, so that the wife (independently of statute) is not entitled to dower, for *Ubi nullum matrimonium ibi nulla dos*—61 Mo. 152. So likewise, the husband is not entitled to curtesy. To consummate the right of dower, three things are requisite, viz: Marriage, seizin and death of the husband. By common law no woman can have dower in her husband's lands, unless the coverture continues up to the time of his death. She must be his wife at that time. By parity of reasoning, the estate by the *curtesy* being that to which a husband is entitled upon the death of the wife, in the lands of which she was seized &c., during their coverture, provided they had issue born alive &c. 1 Washb. Real Prop. 148, and one of the essential requisites of this estate being the death of the wife, his estate can never become consummate by the death of his *wife*, if the woman whom he married ceases to be his wife during her life. 1 Greenl. Cruise, 150; 1 Hilliard, Real Prop. ch. 6, § 42. She must be his wife at the time of her death. 2 Bish. Mar. & Div. 5th Ed. § 725; Id. § 717; 1 Pick. 506; 3 Havr. (Pa.) 182; 22 Pick. 61; 7 S. & R. 500; 11 Ill., 105. Schouler, Husb. and Wife, § 560. In nearly all of the states the property rights of husband and wife as affected by divorce, are regulated by statute.

Kansas City, Mo. C. W. F.

Answer No. 2. The divorce terminates the estate. Matlocks v. Stearns, 9 Vt. 335; Lang v. Hitchcock, 99 Ill. 550; 14 Cent. L. J. 382.

Query 78. [17 Cent. L. J. 399.] The Constitution of the State of Alabama provides the manner in which foreign corporations may do business within that State as follows: Sec. 4, Art. XIV. "No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in this State." Query 1. If A is a corporation "doing business in said State as a railway corporation, and, failing to comply with the provision mentioned, the State refuses to allow it to do such business, is such constitutional provision a regulation of commerce," A running its line of road through two States? 2. When a foreign corporation elects to do business as required by the Constitution, is is not a waiver of the right to have the cases brought against it in the State courts removed to the U. S. Courts? ALABAMA.

Montgomery, Ala.

Answer. It may be doubted that sec. 4 was intended to apply to railways. As to insurance companies, etc., it is valid. Paul v. Virginia, 8 Wall. 168. A State can not prevent a railway, a steamboat or stage-coach from entering its borders, nor in any manner interfere with these instruments of commerce, or by prescribing business methods or rates for interstate traffic. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1; Kaiser v. Illinois Central R. Co., 7 Cent. L. J. 349, and cases cited. 2d. Doing business in another State does not change its citizenship, the jurisdictional fact, (Paul v. Virginia, *supra*); and jurisdiction can not be conferred or waived by agreement. The section, however, provides only for the institution of suits against that class of defendants, without reference to the jurisdiction of any court.

Query 79. [17 Cent. L. J. 399.] Can a party who has notice of facts impeaching the validity of a note (for instance, failure of consideration), purchase it of an innocent holder, having a right of action therein, and collect it from the maker, or would his knowledge of the defense against the note defeat his recovery, even though the party he purchased it from had a right to recover thereon?

Council Bluffs, Iowa. S. & S.

Answer No. 1. A *bona fide* holder *for value* of a negotiable bill or note "has all the world for a market," and may confer as good a title as he himself has; hence, if the bill or note be good against all defenses in his hands, it is equally as good in the hands of his endorsee, no matter if the latter pays no value

for it and has notice of defects in and defenses to the instrument, for he claims by virtue of his indorser's title. "The purchaser can't be placed on a worse footing than his transferrer, although he himself could not in the first instance have acquired the vantage ground occupied by such transferrer." 1 Dan. Neg. Inst. 2 Ed. 656, and cases cited Byles on Bills, 6 Ed. 194, 35 Iowa, 257; 33 Iowa, 537; 18 Iowa, 571, 10 Md. 118; 12 La. Ann. 126; 20 La. Ann. 282; 34 Ind. 380; 14 Tex. 354.

Kansas City, Mo. C. W. F.

Answer No. 2. Any want or failure of consideration, whether partial or total, between antecedent parties, will constitute no defense to a note or bill in the hands of one who obtained it in good faith, for a valuable consideration, before maturity and without any notice of any circumstances impairing its validity. Bostwick v. Dodge, 1 Doug. (Mich.) 413; 29 Mich. 355; 33 Mich 32. When the plaintiff has purchased a note before due, and is a *bona fide* holder, any inquiry into the consideration of the note is immaterial, the defendant can not prevail against such a holder for a defect of consideration. 27 Mich. 44. The general rule that a purchaser from a *bona fide* holder of negotiable paper, takes it with all the rights of such holder, whether he has notice of any infirmity, as between the original parties, or not, is subject to the exception that when the payee becomes such purchaser from the *bona fide* holder, he takes it subject to all equities and defenses originally existing against it between the maker and himself. Rost v. Bender, 25 Mich. 515.

Grand Rapids, Mich. T. H. GIRARD.

Answer No. 3. A party who has notice of failure of the consideration of a promissory note may purchase of an innocent holder having a right of action therein, and collect the note of the maker, because when the note becomes due in the hands of an innocent purchaser for value the maker's liability becomes fixed and it is of no consequence to him to whom he pays it. On the other hand, there is no reason why the innocent purchaser's right of sale should be any more restricted than his right to collect. Bassett v. Avery, 15 Ohio, St., 299; Peabody v. Rees, 18 Iowa, 571; Mornyer v. Cooper, 35 Iowa, 257; Simon v. Merritt, 33 Iowa, 537; Miller v. Talcott, 54 N. Y., 114; Edwards' Bills, etc., § 517; Story on Notes, § 191; Story on Bills, § 188, 220. See also Hoffman v. Bank of Milwaukee, 12 Wall, 181; Commissioners v. Clark, 94 U. S., 278; Cromwell v. County of Sac. 96 U. S. 51.

Ottawa, Ills. L. H. S.

NOTES

——Further Bradlaugh litigation is in prospect. The pending action is to obtain a declaration from the court that the order of the House of Commons excluding a member is void, and an injunction to restrain the Sergeant-at-Arms from, by violence or otherwise, preventing Mr. Bradlaugh from entering the House and taking his seat. In the days of Lord Ellenborough or Lord Denman such an appeal to the court might have stood some chance of success. Modern judges are not strong enough to administer a rebuke to the House of Commons, much less to declare its orders bad in law.—*London Law Times.*

——A case which will be of far-reaching importance under the Married Women's Property Act was decided by Mr. Justice Chitty last week. A husband had left his wife and was, it was stated, in occupation of a separate establishment, but he occasionally returned to the house in which his wife was living and on leaving took with him any article on which he could lay his hands. The house had been comprised in the marriage settlement, and was settled upon trust for sale with consent of both husband and wife, while the house itself until sale, and, when sold, the proceeds of sale, were to be for the separate use of the wife, without power of anticipation. Acting on the precedents of Green v. Green (5 Hare 400) and Allen v. Walker (L. Rep. 5 Ex. 187) Mr. Justice Chitty, on the application of the wife, made an order restraining the husband from going to the house. It was urged that this was in effect to grant a judicial separation, which could only be done in the Divorce Court; but the learned judge pointed out that it was only granting the wife that protection for her property to which she was as much entitled against her husband as against a stranger, and if the husband was aggrieved he could provide another house for his wife, and if she refused to live there could sue for the restitution of conjugal rights. As in such a case he could scarcely be successful, it is obvious that under the new Act, by which all a married woman's property is henceforth settled to her separate use, the power of the wife is likely to be materially extended, not only over her property, but also over her person.—*London Law Times.*

——The Council of Discipline of the Turin Bar held a meeting a few days ago, under the presidency of Senator Vegezzi, for the purpose of deciding whether the Signora Lydia Poet should be ad itted upon the list of advocates. She had completed all the prescribed course of studies, and passed all the requisite examinations. Eight votes were given for admitting the young lady and four against her. She was accordingly enrolled among the advocates. But the consequence of this was, that two members of the Council withdrew from it, as a protest against the admission of women advocates.—*Irish Law Times.*

——"Prisoner, this is the third time this year that you have appeared before this court. What has brought you here now, eh?" "The police sir!"